From: Scott Alvarez
To: Arthur Angulo
Cc: Coryann Stefansson; Deborah P Bailey
Subject: Re: SEC
Date: 01/11/2009 06:56 PM

I have not discussed this with the SEC. BAC has complained that someone did talk to the SEC, with the result that the SEC called late last week to say they heard BAC was negotiation a Citi type deal with the USG and to ask BAC to explain the unexpectedly high losses at ML. That said, it sounds like Erik already knows something about what is going on. So I agree you should give him the broad and tentative outlines. I would also let him know that we think this is a matter of systemic importance and that BAC is very sensitive about this. Erik has been very helpful in the past with SEC enforcement and very discrete about sharing supervisory info we give him.

Scott

▼ Arthur Angulo/NY/FRS@FRS

Arthur Angulo/NY/FRS@FRS

01/11/2009 06:35 PM

To Scott Alvarez/BOARD/FRS@BOARD, Deborah P Bailey/BOARD/FRS@BOARD, Coryann Stefansson/BOARD/FRS@BOARD

cc

Subject SEC

Have we conveyed anything to the SEC re the BAC situation? I rec'd an e-mail and follow up VM from Erik Sirri on Friday evening -- he will be at the FRBNY tomorrow attending the regulators meeting re the CDS CCPs, and he wants to duck out to see me...Based on his VM, he knows something is up...I intend to give him the broad outlines, but before doing so I wanted to check to how much (if anything) has been shared with the SEC...Thx.

From: "Bair, Sheila C." [SBair@FDIC.gov]
Sent: 01/14/2009 08:43 PM EST
To: Chairman's Email Redacted
Subject: What we could do -- maybe

Dear Ben,

Strong discomfort with this deal at the FDIC, for all of the reasons you and I have discussed. Also, I understand from staff that the size and composition of the pool is still somewhat up in the air, so it is difficult for us to evaluate the adequacy of BoA's 10 billion deductible. Here is the best I think we can do. The FDIC will take 25% of the USG 10 billion loss share, which corresponds with the percentage of the ringfenced assets coming out of the insured entities. We will do the loss share with Treasury, pro-rata (taking 25 cents to their 75 cents for each dollar of loss) and similarly share pro rata with the preferred shares and warrants issued by BofA as premia. We will also amend the TLGP program to facilitate BofA doing a guaranteed covered bond deal, while announcing that we will entertain applications from other TLGP participants to do the same. We will work in good faith with you, Treasury, BofA and PIMCO to determine the appropriate deductible.

Let me know if you think this will work. My board does not want to do this, and I don't think I can convince them to take losses beyond the proportion of assets coming out of the depository institutions.

Sheila

PS Reading the term sheet, I think the FRB has ably covered itself on the tail risk. You guys are tough!

From:
Sent: 12/23/2008 05:44 PM EST
To: Jeffrey Lacker
Cc: Jennifer Burns
Subject: Re: Color from the Chairman

I think he is worried about stockholder lawsuits; knows they did not do a good job of due diligence and the issues facing the company are finally hitting home and he is worried about his own job after cutting loose lots of very good people.

Mac Alfriend
Senior Vice President, Banking Supervision and Regulation
The Federal Reserve Bank of Richmond

Office 804 · 697 · 8411 · Cell 804 · 512 · 4186
address deleted

www.richmondfed.org

THE FEDERAL RESERVE BANK OF RICHMOND
RICHMOND • BALTIMORE • CHARLOTTE

Kevin Warsh/BOARD/FRS

12/29/2008 12:58 PM

To Chairman's Email Address Redacted

cc Donald L Kohn/BOARD/FRS@BOARD, Michelle A Smith/BOARD/FRS@BOARD, Scott Alvarez/BOARD/FRS@BOARD

Subject BofA

Ben:

Spoke with BoA folks this morning, mostly Joe Price (CFO) They seem to have taken on board some of the ideas we discussed with them last week, but did not instill a ton of confidence that they have got a comprehensive handle on the situation. Their views, however, are evolving towards asking for some relief to parent co in addition to ML.

ML: They proposed mix of government capital (common-like, non-voting equity) plus asset wrap ($140Bn) with "fill the whole" at ML for the "good of the system". Cost of government support here will need to be negotiated here, but they think they are entitled to some favorable terms because they have agreed to go forward to closing. I reminded them that they are the ones who would look equally bad in eyes of market and regulators if they chose to terminate transaction. T

F... With respect to BoA, they now propose reducing dividend payout to "no... nt.. With respect to capital raise, they want to target all-in-capital raise... ation to 3 to 3.5%, which seems like a total capital raise of $12-1... serving as backstop in event they couldn't raise capital ... are

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MEMORANDUM

TO: Scott Alvarez

FROM: Legal Div. Atty

RE: Material Adverse Effect Clauses in Merger Agreements

DATE: December 22, 2008

Background and Discussion[1]

A "material adverse effect" or "material adverse change" (collectively, "MAE") clause in a merger agreement is a mechanism to allocate risk among the parties between the time of the agreement's execution and closing of the transaction. MAE clauses are present in some fashion in virtually every merger agreement[2] and generally provide that, if the target suffers a MAE between execution and closing, the acquiror can terminate the agreement without being liable to the target for breach. The parties usually spend a great deal of time negotiating over what constitutes a MAE, with the acquiror preferring a broad definition that allows maximum flexibility to walk away from the deal and the target preferring a narrow definition to ensure closing. Despite being so heavily negotiated, definitions are often framed in broad, vague terms and include large carve-out provisions,[3] leaving it up to the courts to decide whether a MAE has occurred in the event of a dispute.[4] In making that determination, courts generally prefer to look at each case based on its specific facts and, as a result, there is <u>no</u> definitive test or standard for determining "materiality." Nevertheless, three decisions issued by the Delaware Chancery Court over the last several years provide a framework that can be used to assess MAE clauses.[5] The framework consists of certain general principles and several specific factors that may be taken into account in determining whether an MAE actually occurred.

A. General Principles

In analyzing any given MAE clause, a Delaware court will likely follow at least four general principles:

[1] This discussion is based on several law review and legal articles and my own analysis of the relevant case law.

[2] Such clauses usually are found in the representations and warranties and then "brought down" to closing in a "bring-down" condition that requires the continued accuracy of representations and warranties as a condition to closing.

[3] Frequent carve-outs include declines in the overall economy or in the relevant industry (sometimes with further carve-outs for declines that disproportionately impact the target), adverse weather, political, economic or general business conditions, and changes in applicable laws, rules, regulations, or GAAP.

[4] There is some speculation that, as a result of recent credit market turmoil and adverse economic conditions, an increasing number of acquirors will attempt to rely on MAE clauses to back out of merger agreements.

[5] These three cases are summarized in the next section of this memorandum.

1. The court will first consider whether the alleged MAE was included under the MAE clause. If so, the court will then consider whether an MAE actually occurred. Only if an MAE actually occurred will the court consider any carve-outs.

2. The court will employ general contract law and look first to the language of the MAE clause to determine the parties' intent. If the language is ambiguous, the court will then look to extrinsic evidence of intent. More often than not, Delaware courts find the language ambiguous.

3. The court's inquiry will likely be very fact-intensive and involve close scrutiny of the parties' negotiations before executing the agreement, as well as the parties' conduct while the agreement was in effect and following its termination.

4. The party alleging the MAE bears the burden of proof in establishing that an MAE occurred.[6] This is a very heavy burden, as no Delaware court has found an MAE to have occurred in the context of a merger agreement.

B. Specific Factors

A Delaware court may also take into account several specific factors in determining whether an MAE actually occurred:

1. Where the acquiror is alleging the MAE, the court will consider whether (a) unknown events (b) substantially threaten (or threatened) the overall earning potential of the target (c) in a durationally significant manner. The court will not find an MAE to have occurred unless all three prongs are met.

2. The court will likely take into account what the parties considered "material" to the transaction. For example, the parties may have included specific financial benchmarks or criteria in the MAE clause or related provisions that the court may consider indicative of materiality.

3. The court may consider the acquiror's purpose in acquiring the target (e.g., short-term investment or long-term strategic merger).

4. The court may focus on whether the alleged MAE could have been handled by a specific contract term (e.g., whether an acquiror alleging a MAE could have protected itself against the event through an explicit, specific representation or warranty from the target).

5. The court may also look to the commercial context of the alleged MAE (e.g., whether declines are in a core or a secondary business line).

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[6] Of course, the parties remain free to allocate the burden otherwise in the agreement and any such allocation will govern.

6. The court will likely analyze the size, impact, extent, and historical context of the alleged MAE. For example, if an acquiror alleges that a decline in the target's earnings constitutes an MAE, a court will likely look at the absolute and proportionate amount of the decline, as well as the decline in the broader context of the target's historical earnings.

7. Finally, the court may consider whether the party alleging the MAE has any alternative motives for attempting to exit the transaction, as well as whether the MAE claim is reasonable and in good faith.

Summary of MAE Clause Case Law

Until mid-2001, courts adopted an expansive approach in determining whether an event was a MAE, with MAE clauses being viewed primarily as protection for buyers. Courts generally applied a "reasonable buyer" standard and the key consideration was whether the event would impact a reasonable buyer's decision about moving forward with the transaction. The events that courts found to constitute MAEs included declines in earnings, operating losses, reductions in income, and general economic or business conditions that had a disparate impact on a company compared to the economy as a whole.

In June 2001, the Delaware Chancery Court decided In re IBP Shareholders Litigation[7] and dramatically changed the MAE clause playing field. At issue was a MAE clause in a merger agreement between Tyson Foods Inc. ("Tyson") and IBP, Inc. ("IBP"), the U.S.'s largest poultry producer and beef supplier, respectively, that defined a MAE as "any event, occurrence or development of a state of circumstances or facts which has had or reasonably could be expected to have a [MAE] ... on the condition (financial or otherwise), business, assets, liabilities or results of operations of [IBP] . . ."[8] Following the execution of the merger agreement in January 2001, IBP suffered large quarterly losses and had to restate its financials. Tyson sought to terminate the deal, arguing that termination was justified because IBP's financial difficulties constituted a MAE. IBP filed suit to specifically enforce Tyson's performance.

As an initial matter, the court said that a party "ought to have to make a strong showing to invoke a [MAE] exception to its obligation to close," thus placing the burden of proof on Tyson. The court then considered whether an MAE occurred, looking first to the language of the MAE clause to determine the parties' intent. Since the language was ambiguous, the court looked to extrinsic evidence, concluding that the MAE clause had to be "read in the larger context in which the parties were transacting."

The court then promulgated the following framework for determining whether a MAE occurred: MAE clauses are "best read as a backstop protecting the acquiror from *unknown events* that *substantially threaten* the overall earnings potential of the target in a *durationally-significant* manner" (emphasis added). The court stressed that this framework is "heavily

[7] 789 A.2d 14 (Del. Ch. 2001). The court applied New York contract law in this case, but subsequently adopted the same reasoning in applying Delaware contract law. See Frontier Oil Corporation v. Holly Corporation, 2005 Del. Ch. LEXIS 57 (Del. Ch. 2005) (unpublished).

[8] The MAE clause had no carve-outs for the adverse effects of economic or industry-wide conditions.

influenced by [a] temporal perspective" that requires materiality in the context of a merger to be assessed in relation to "the longer-term perspective of a reasonable acquiror." Applying this framework to the facts of the case, the court carefully scrutinized the matters that IBP and Tyson reviewed, discussed, and decided to include in the MAE clause, and focused on Tyson's actual and subjective knowledge of the risks involved in the transaction and on Tyson's objective in acquiring IBP. The court found that Tyson had access to IBP's historical financial data, which showed that IBP's business was cyclical in nature and subject to strong swings in earnings, and that the duration and degree of IBP's quarterly losses were not sufficiently material to threaten IBP's long-term prospects. Accordingly, the court concluded that IBP had not suffered a MAE, and that Tyson could not terminate the agreement on that basis and must specifically perform its obligations.[9]

The next significant development in MAE case law occurred about four years later, in April 2005, when the Delaware Chancery Court decided Frontier Oil Corporation.[10] At issue was a MAE clause in a March 2003 merger agreement between two petroleum oil refiners, Frontier Oil Corporation ("Frontier") and Holly Corporation ("Holly"). Under the clause, Frontier represented that "there are no actions, suits or proceedings pending against Frontier ...other than those that would not have or reasonably be expected to have, individually or in the aggregate, a [MAE.]" MAE was defined as "a material adverse effect with respect to (A) the business, assets and liabilities (taken together), results of operations, conditions (financial or otherwise) or prospects of a party..."[11] Frontier filed suit claiming that Holly repudiated the agreement and Holly countered that Frontier breached its representation that certain litigation "would not reasonably be expected to have" a MAE.

The court began its analysis by specifically adopting the framework articulated in In re IBP Shareholders Litigation, determining first that the burden was on Holly – the party claiming that an MAE occurred – to prove (by a preponderance of the evidence) that Frontier had suffered an MAE. The court then engaged in a fact-sensitive inquiry to assess Holly's claims that that the risk of adverse results in the litigation and the costs of defense would have, or would reasonably be expected to have, a MAE on Frontier. The court concluded that the risk of adverse results was speculative and that Holly had not shown that litigation costs would have "a significant effect if viewed over a longer term." Accordingly, the court concluded that Holly failed to meet its burden.

More recently, the Delaware Chancery Court decided Hexion Specialty Chemicals, Inc. v. Huntsman Corp.[12] At issue was a MAE clause in a merger agreement between Hexion Specialty Chemicals, Inc. ("Hexion") and Huntsman Corp. ("Huntsman"), two large chemical companies, that defined a MAE as "any occurrence, condition, change, event or effect that is materially adverse to the financial condition, business, or results of operations" of Huntsman.

[9] It is worth noting that the merger agreement did not provide for specific performance as a remedy.

[10] 2005 Del. Ch. LEXIS 57.

[11] The clause had carve-outs for "general economic, regulatory or political conditions or changes therein in the United States or the other countries in which such party operates," fluctuations in financial markets or conditions, and "changes in, or events or conditions affecting, the petroleum refining industry generally."

[12] 2008 Del. Ch. LEXIS 134 (Del. Ch. 2008).

Carve-outs included "any occurrence, condition, change, event or effect resulting from or relating to changes in general economic or financial market conditions" or that affects the chemical industry generally, except to the extent such occurrence, condition, change, event or effect had a disproportionate effect on Huntsman as compared to other chemical industry participants. Huntman's financial performance dramatically declined following the execution of the agreement in July 2007 and Hexion filed suit seeking determinations that Huntsman had suffered a MAE and that Hexion was not obligated to perform its obligations under the agreement. Huntsman countered that Huntsman breached the agreement and sought specific performance.

The court began its analysis by reaffirming that Delaware courts apply the framework established in In re IBP Shareholders Litigation in assessing MAE clauses, and went on to explain how that framework applies when the clause at issue includes carve-outs. More specifically, the court reiterated that the burden of proof rests on the party seeking to excuse its performance based on the existence of an MAE and that an MAE results only where unknown events substantially threaten the overall earnings potential of the target in a manner which persists into the future or is "durationally significant." According to the court, carve-outs are to be considered only if the court first finds a MAE actually occurred. Once an MAE is established, the MAE may be compared for proportionality to changes in the industry to see if the MAE should be carved out.

Applying the framework to facts of the case, the court concluded that Hexion had not met its burden of proving a MAE occurred.[13] The court, like the court in In re IBP Shareholders Litigation, emphasized that, for the purpose of determining whether a MAE has occurred, changes in a company's financial condition must be examined in the context in which the parties were transacting. The court proceeded to closely scrutinize that context and concluded that a short-term decline in earnings, such as that experienced by Huntsman, does not suffice to invoke a MAE clause without the expectation that "poor earnings results ... [will] persist significantly into the future."[14] The important consideration, according t the court, is "whether there has been an adverse change in the target's business that is consequential to the company's long-term earnings power over a commercially reasonable period, which one would expect to be measured in years rather than months." The court concluded that Huntsman had not undergone such an adverse change and, therefore, had not suffered an MAE. Accordingly, the court declined to reach the question of whether Huntsman's performance was disproportionately worse than the industry as a whole. The court ordered Hexion to specifically perform its obligations under the agreement other than its obligation to close, which the agreement did not allow Huntsman to specifically enforce.

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[13] The court pointed out that Delaware courts have never found an MAE to have occurred in the context of a merger agreement.

[14] In Genesco Inc. v. The Finish Line, Inc., Memorandum and Order, No. 17-2137-II(III) (Tenn. Ch. Ct. filed Dec. 27, 2007), the Tennessee Chancery Court considered a MAE clause similar to the clause at issue in Hexion Specialty Chemicals. The court, relying heavily on In re IBP Shareholders Litigation, ultimately concluded that no MAE occurred and ordered specific performance. In so doing, however, the court said that a MAE could occur in a span as short as three to four months – a departure from the Delaware decisions.

address deleted

12/22/2008 02:14 PM

To Scott Alvarez/address deleted

cc Kevin Warsh/ , Randall S Kroszner/address deleted Donald L Kohn/ address deleted, Deborah P Bailey/

Subject BAC

Had a good conversation with Lewis just now. He confirms his willingness to drop the MAC and to work with the government to develop whatever support package might be needed for earnings announcement dates around Jan 20. We discussed his common equity issue. We agreed that having a significant amount of TARP capital in the form of common was not an ideal solution, given the ownership implications. But we agreed both to think about possible solutions (eg, a govt backstop of a capital raise, govt common with limited control rights etc.).

He had a question which I will address to Scott (also to Deborah). He said he now fears lawsuits from shareholders for NOT invoking the MAC, given the deterioration at ML. I don't think that's very likely and said so. However, he still asked whether he could use as a defense that the govt ordered him to proceed for systemic reasons. I said no. It is true, however, that we have done analyses that indicate that not going through with the merger would pose important risks to BAC itself. So here's my question: Can the supervisors formally advise him that a MAC is not in the best interest of his company? If we did, could he cite that in defense if he did get sued for not pursuing a MAC?

From:
To: Scott Alvarez
Subject: Re: Fw: BAC
Date: 12/23/2008 11:08 AM
Encrypted

Thanks, Scott. Just to be clear, though we did not order Lewis to go forward, we did indicate that we believed that going forward would be detrimental to the health (safety and soundness) of his company. I think this is remote and so this question may be just academic, but anyway: What would be wrong with a letter, not in advance of a litigation but if requested by the defense in the litigation, to the effect that our analysis supported the safety and soundness case for proceeding with the merger and that we communicated that to Lewis?

▼ Scott Alvarez address deleted

Scott Alvarez/ address deleted	To	address deleted
	cc	
12/23/2008 10:18 AM	Subject	Re: Fw: BAC

Mr. chairman,

Shareholder suits against management for decisions like this are more a nuisance than successful. Courts will apply a "business judgment" rule that allows management wide discretion to make reasonable business judgments and seldom holds management liable for decisions that go bad. Witness Bear Stearns. A different question that doesn't seem to be the one Lewis is focused on is related to disclosure. Management may be exposed if it doesn't properly disclose information that is material to investors. There are also Sarbanes-Oxley requirements that the management certify the accuarcy of various financial reports. Lewis should be able to comply with all those reporting and certification requirements while also completing this deal. His potential liability here will be whether he knew (or reasonably should have known) the magnitude of the ML losses when BA made its disclosures to get the shareholder vote on the ML deal in early December. I'm sure his lawyers were much involved in that set of disclosures and Lewis was clear to us that he didn't hear about the increase in losses till recently.

All that said, I don't think it's necessary or appropriate for us to give Lewis a letter along the lines he asked. First, we didn't order him to go forward--we simply explained our views on what the market reaction would be and left the decision to him. Second, making hard decisions is what he gets paid for and only he has the full information needed to make the decision--so we shouldn't take him off the hook by appearing to take the decision out of his hands.

Let me know if you'd like any more info on this.

Scott

address deleted

Preliminary, confidential views from scott and me (see note below plus attachment) without benefit of sup and reg staff input

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--Sent from my BlackBerry Wireless Handheld

From: Kevin Warsh
Sent: 12/21/2008 12:42 PM EST
To: Kevin Warsh, Chairman's email address redacted.

Attached please find some discussion points that Scott and I iterated overnight. Obviously, the actual talkers will depend significantly on what we hear from our Staff this afternoon.

Great work on de-escalating BA, the more time we have the better.

It is key that we understand how December is faring for BA's comparable banks. It is also critical to understand BA's view on disclosure requirements (e.g., 8-K), particularly whether they would need to discuss pro forma financials if and when transaction is consummated in first week of January. If their first disclosure is at time of Jan 19 earnings announcement, then we can better evaluate the prospects for a private capital raise by the company in the new year.

Thanks

Kevin

Thanks, Kevin. Yesterday I sent you, Don, and Scott some thoughts on how to structure the Fed's participation in wraps. As we plan for this, it would be helpful to know whether my idea (which is meant to insulate monetary policy from these deals) or something like it is feasible.

▼ Kevin Warsh/BOARD/FRS

Kevin Warsh/BOARD/FRS	To	Chairman's Email Address Redacted
	cc	Donald L Kohn/BOARD/FRS@BOARD, Michelle A Smith/BOARD/FRS@BOARD, Scott Alvarez/BOARD/FRS@BOARD
12/29/2008 12:58 PM	Subject	BofA

Ben:

Spoke with BoA folks this morning, mostly Joe Price (CFO) They seem to have taken on board some of the ideas we discussed with them last week, but did not instill a ton of confidence that they have got a comprehensive handle on the situation. Their views, however, are evolving towards asking for some relief to parent co in addition to ML.

ML: They proposed mix of government capital (common-like, non-voting equity) plus asset wrap ($140Bn) with "fill the whole" at ML for the "good of the system". Cost of government support here will need to be negotiated here, but they think they are entitled to some favorable terms because they have agreed to go forward to closing. I reminded them that they are the ones who would look equally bad in eyes of market and regulators if they chose to terminate transaction. T

Parent: With respect to BoA, they now propose reducing dividend payout to "nominal" amount.. With respect to capital raise, they want to target all-in-capital raise that takes TCE ration to 3 to 3.5%, which seems like a total capital raise of $12-15 Bn, with government serving as backstop in event they couldn't raise capital themselves. They'd also like asset wrap of about $50 Bn for BoA assets "that are comparable to" ML. On BoA pieces, recognize that terms of government support would be more expensive.

They would hope to announce comprehensive package with our support on Jan 20 (happy inauguration day, mr. president).

Don and I are talking with Fed staff plus OCC plus Treas tomorrow afternoon, and should have better view of way forward after that. BoA is going to talk with Exec Committee of its Board on Wednesday, and I told Price I'd give him some preliminary guidance by then

Thanks

Warsh/BOARD/FRS

12/30/2008 07:30 PM

To Chairman's Email Address Redacted /BOARD/FRS@BOARD

cc Donald L Kohn/BOARD/FRS@BOARD, Scott Alvarez/BOARD/FRS@BOARD, Michelle A Smith/BOARD/FRS@BOARD, Brian F Madigan/BOARD/FRS@BOARD

Subject BofA

Ben:

Don, Scott, and I engaged in long conference calls today (including Dugan/OCC and McCormick/Treas) along two tracks (BofA and Broader Financials). We are thinking about package for BofA/ML that is likely to be "bridge" to the broader TARP tranche II Geithner caper.

On BofA, we are getting closer to get our hands around the asset pools (largely but not exlcusively resident at ML) of which we would provide some tail risk protection. Looking at other models or risk-sharing (as you suggested) other than Citi and with an eye towards replication.

We are also wrestling with capital raises by BofA with various types of support from the official sector. Knowing the market's willingness to fund BofA following January 20th big bang announcement remains tough question that we are unlikely to get firmer grip on until end of next week. Finally, we engaged in discussions among us regulator types and with BofA today on what their new dividend policy should be (accord that dividends would be "nominal" -- debate what that means)

I spoke with BofA CFO today and tonight. They just finished a meeting with the Executive Committee of the Board. Board understands our views that they should close ML in everyone's interests and that we are working in good faith to structure a transaction that works for them and the government. To that end, however, Boards don't tend to like relying on good faith and its associated ambiguity.

So, Ken is going to call you (at his Board's behest tomorrow) to reaffirm the understanding you have. I think your response should be as balanced it was the other day -- (Scott can help) -- perhaps something like "We believe it is in your interest to close ML and we will continue to work with you constructively (as we have the last few days) to achieve an outcome that works for everyone....our terms are not intended to be punitive...nor are they intended to provide BofA with a gift courtesy of the official sector." Ken may also raise his favorite perennial issue -- that is, is the Richmond supervisory team on same page as the Board. Richmond staff was on our call today, but prior the call, it sounds like they may have threatened a little more than ideal on need to get rid of dividend and fast -- I told Price system will be making joint determination.

Ken will also be calling Hank and perhaps Tim.

From:	Kevin Warsh
To:	
Cc:	Donald L Kohn; Michelle A Smith
Subject:	BofA
Date:	12/26/2008 11:01 AM

Don and i did conference calls with Staff from Board, Richmond, NY on situation on Wednesday. Still seems to be consensus that that problems are more significant than ML alone.

We are reconvening with our guys again on Tuesday to discuss in more detail strawman proposals that deal with ML problems predominantly and a more aggressive case that deals with BoA/ML together. Key to our ultimate determination will be market perceptions (that is, will markets see problems beyond ML, particularly given relatively low levels of tangible common equity at parent). To that end, we are working on mix of distressed asset fixes and capital injections that may diverge from Citi model. For example, we are considering a structure where the Government is backstop funder or provides capital match for private capital raise by BoA.

I spoke with Joe Price (CFO of BofA) several times in last couple of days, urging them to think with force and speed during our little window of seeming calm in next week. I asked him and his team to have their own version of strawman proposal for us to consider by next Tuesday as well. They need to take more ownership of situation. Also, spoke with Dugan and McCormick. Dugan's staff will be working with ours to further evaluate pro forma entity and alternatives for consideration on Tuesday. Will continue to keep Treas posted

Separately, Don is continuing to lead discussion about broader uses of TARP and other USG facilities with Tim for Jan 20 and beyond. His group (including NY Fed) is reconvening Monday to discuss.

Thanks

Kevin

Some very preliminary thoughts on getting a pound of flesh out of Lewis. Should we do this as part of the agreement to bail them out or just let them know that we will be contacting them with a board resolution/mou in January. Your thoughts

From: Deborah P Bailey
To: Mac Alfriend; Roger Cole
Subject: Re: BAC
Date: 12/20/2008 01:32 PM

Mac, if we need to do something I think we will look at d
think that it would be done with a series of actions includ
dividend, some supervisory action (MOU) that covers ma
think management should be downgraded, no more acq
capital, frequent meetings with the Board,etc. It will def
always had my doubts about the quality of the due dili
deal. Don't forget they paid a premium. How do you
for h lp? This will not go over well at all.

Let's eep talking on these points.

Sent n the Blackberry of Deborah Bailey
▼ M lfriend

-- ginal Message -----
ac Alfriend
2/20/2008 12:34 PM EST
rah Bailey; Roger Cole
BAC
ome very preliminary thoughts on getting a pound of flesh out of
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olution/mou in January. Your thoughts

M
S Supervision and Regulation

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Personally I think management should be downgraded, no more acquisitions, raise some "real" capital, frequent meetings with the Board, etc. It will definitely a price to pay. I always had my doubts about the quality of the due diligence they did on the ML deal. Don't forget they paid a premium. How do you pay a premium and now ask for help? This will not go over well at all.

RS
RS@FRS, Jennifer
Lisa A White/RICH/FRS@FRS,
@FRS, Stacy L
RS, Trish
S

rnight funds (short term

Eric Rosengren/BOS/FRS

01/16/2009 03:29 PM

To: Rita C Proctor/BOARD/FRS

cc: Donald L Kohn/BOARD/FRS@BOARD, Elizabeth A Duke/BOARD/FRS@BOARD

Subject: ring fencing

Dear Ben:

I wanted to follow up on my question this morning. Going forward I am concerned if we too quickly move to a ri... strategy. Parti... significant ... asp of the ... ve them. I ... nk of ... ne UK ... bank. ... tions. ... crease ... eholders hav... ate required additional capital, and new outside directors are being selected. Such a strategy obviously has pitfalls, but I would not want to discard this option prematurely.

Going forward I am concerned if we too quickly move to a ring fencing strategy. Particularly if we believe that existing management is a significant source of the problem and that they do not have a good grasp of the extent of their problems and appropriate strategies to resolve them.

Eric

Eric S. Rosengren
President & CEO
Federal Reserve Bank of Boston
617.973.3090 Fax: 617.973.3173
eric.rosengren@bos.frb.org